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OCTOBER TERM 1959

No. 653

WILLIAM MEYERS, STANDARD BRANDS INCORPORATED, ATLANTIC GUMMED PAPER CORPORATION and WARSHAW MANUFACTURING, INC.,

Petitioners,

vs.

FAMOUS REALTY, INC., and MOSES SPATT and JOSEPH S. WOHL, individually and as Director-Trustees in Dissolution thereof,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEF

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This reply is necessary because (1) respondents' brief contains misstatements of facts of record on the basis of which, respondents contend—and could not otherwise—that no conflict exists between the decision below and the decisions cited in the Petition, and (2) respondents raise a new issue, namely, mootness.

Respondents state (pp. 7 and 10) that the complaint contains no allegation that respondents or their grantors are

or were carriers by railroad or that either ever operated the railroad as to which the injunction is sought. However, paragraph "5" of the complaint alleges:

> "* * * Prior to 1941, and from as early as about 1916 Jay Street Terminal and Arbuckle Brothers [the two partnerships which are respondents' grantors] had themselves carried on the interstate railroad business carried on after that date by Jay Street Connecting Railroad."

This is a clear allegation both that the grantors were carriers by railroad and that they operated the railroad in question. In addition, it is necessarily an allegation that the grantors were carriers subject to the Interstate Commerce Act, since it is established that a carrier which began operations prior to the enactment of Sections 1 (18-20) of the Act "in the performance of the service for many years, * * * incurred the relationship and duty to the public of a common carrier by railroad subject to the Act" *Livestock Terminal Company Abandonment of Operations*, 257 I.C.C. 1, 7 (1944).

Respondents (departing from the allegations of the complaint) assert further that the part of the operation conducted by the grantors prior to 1941 was only a water operation. At best from respondents' point of view that would be a matter for proof at the trial. The facts in 244 I.C.C. 43, however, indicate that such operation included, in addition to water transportation, the operation of various tracks in and about the float bridge and freight station and the operation of the freight station, which necessarily required the transporting of cars between the pierheads and such station. Whether it owned or leased its motive power for such transporting is, of course, immaterial.

Respondents quote from the Commission's report of April 13, 1959, in *Jay Street Connecting Railroad Abandon-*

ment, 307 I.C.C. 137, 164 to the effect that *Livestock Terminal Co. Abandonment*, 257 I.C.C. 1 is not a valid precedent for requiring the lessors [respondents herein] to continue the railroad's operation. Taken at its face value, this quote emphasizes the conflict asserted by petitioners to exist between the *Livestock* case and the decision below. However, respondents neglect to inform the Court of an additional significant fact regarding this quote. In said report the Commission also denied the request of protestants [petitioners herein] to condition any authority to abandon upon first offering to sell the railroad for continued operation as a going concern at its salvage value and with the same lease rights. The Commission supported this denial by asserting its lack of jurisdiction over the lessors (307 I.C.C. 137). Subsequently, on petition for reconsideration, in which petitioners urged the existence of such jurisdiction, the Commission reversed itself on this point and, without further report, by order dated May 26, 1959 imposed the requested condition (see *Jay Street Connecting Railroad* v. *U. S.*, 174 F. Supp. 609, 613 (E.D.N.Y., 1959). This condition is quoted by the Court below. (Petitioners' Appendix, p. 14). Cf. *Livestock* decision, page 7.

Respondents' final reason for urging denial of the Petition is the alleged sale to Consolidated Edison Company, since the decision below, of *part* of the land and appurtenances formerly operated by respondents' grantors and thereafter leased by respondents to the railroad. Obviously, however, if the principle asserted to conflict with the decision below is upheld, a transfer to a grantee with knowledge cannot avoid the obligations imposed by the principle—a fact which, the Court below itself recognized (Petitioners' Appendix, pp. 18). Furthermore, substantive rights cannot be changed by timing the transfer to occur pending appeal. *Mendez* v. *Bowie*, 118 F. 2d 435, 440 (1 Cir. 1941). Neither does timing of the transfer raise any procedural difficulty since Rule 25 (c) of the Rules of Civil Procedure offers

ample protection should it develop either before or during the trial that the ownership of the part of the property allegedly sold is material to a decision at the trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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